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IN THE

Supreme Court of the United States

October Term, 1959

No. 309

HENRY HANCOCK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to the Court of Appeals for the Second Circuit to review the judgment of the court below entered June 23, 1959.

Opinion Below

The opinion of the court below has not been officially reported but is set out in Appendix "A", *infra*, at pp. 13-15. The District Court did not write or deliver an opinion.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered June 23, 1959. An order staying the issuance of the mandate pending application for a writ of certiorari to this Court was granted on July 17, 1959. The jurisdiction of this Court is invoked under Title 28, United States Code, § 1254(1).

Question Presented

Petitioner was convicted of violating the Act of July 16, 1952, 66 Stat. 722, 18 U. S. C. § 1343, on the basis of alleged fraudulent representations made by him during the course of an interstate telephone conversation originated by a bank official in New York City and on which the bank did not rely in making a loan to Petitioner's company. Did these fraudulent representations constitute a transmission by means of wire communication in interstate commerce for the purpose of executing a scheme to defraud within the meaning of the statute?

Statutory Provision Involved

The statute involved is the Act of July 16, 1952, 66 Stat. 722, 18 U. S. C. § 1343 which provides as follows: "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

Statement of the Case

On October 28, 1958, Petitioner was convicted of violating 18 U. S. C. § 1343 and was sentenced to imprisonment for a period of six months. The indictment contained three counts. The first two charged petitioner and another with use of the mails to defraud, 18 U. S. C. § 1341. On the first count the jury failed to agree. On the second the trial judge directed acquittal of both defendants. On the third, under 18 U. S. C. § 1343, Petitioner Hancock was found guilty, and the jury disagreed as to his co-defendant.[1] As described by the court below, the essence of the scheme to defraud "was to induce the Guaranty Trust Company to make a loan to Estey Organ Corporation by giving to the lender a balance sheet containing false figures as to 'cash on hand and in the banks' and as to accounts receivable of the borrowing corporation. The bank balances were made to appear larger than in fact they were by failing to subtract outstanding checks. The receivables were falsified by preparing invoices purporting to show shipments which were not actually made" (Appendix "A", *infra*, at p. 14).

A. The Evidence Relating to Communications By Wire

On April 14, 1955, Robert Morey, an officer of the Guaranty Trust Company, placed a telephone call from New York City to the Estey Organ Corporation in Brattleboro, Vermont, in order to obtain a balance sheet and list of accounts receivable resulting from shipments.

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[1] After describing the fraudulent scheme, the third count of the indictment alleged "That on or about the 14th day of April, 1955 the defendants, Henry Hancock and Elizabeth S. Mackay Scott * * * within the District of Vermont, *did, for the purpose of executing the aforesaid scheme and artifice, communicate by interstate wire communication with Robert Morey, an official of the Guaranty Trust Company*, that is to say by means of telephone from Brattleboro, Vermont to New York, New York; in violation of Section 1343, Title 18, United States Code" (R. 705-706). (Emphasis supplied.)

during the first two weeks of April (R. 125-126, 464). Morey testified that during the conversation "Mr. Hancock made the statement that he had received orders of two hundred thirty thousand dollars in pipe organ shipments since April first [and that] shipment since April first had been two hundred seventy-two thousand dollars . . ." (R. 134). However, Morey testified that in making the loan he relied on a written communication dated April 14, enclosing Estey's "balance sheet" (R. 133), and another written communication dated April 16, enclosing the "accounts receivable" (R. 136-137). He also took into consideration his visit to the Estey plant in Brattleboro and his conversation with the defendants in Vermont at that time (R. 137).[2] On direct examination, in response to the question whether the bank loan would have been made "on other statements than the statements furnished you directly by the papers indicated as Government's 6 and 7 [the letters of April 14 and 16]", Morey testified, "We would never make a loan without a statement, a financial statement" (R. 137).

Randall, a public accountant, testified that on April 14 or 15 petitioner requested him to talk to Mr. Morey on the telephone, "the telephone [being] off the hook at the time he went in the office." After Randall got on the telephone, Morey asked him if he "had run a tape of current shipments for Mr. Hancock and I told him that my assistant had just ran a tape for them, and as I recall it, Sir, Mr. Hancock showed me the tape at that moment and I was able to give the amount of the tape [allegedly false] to [Mr. Morey]" (R. 223-225). In connection with the same telephone conversation, co-defendant Scott testified

[2] Morey testified that he had visited the Estey Plant in Brattleboro about the middle of February, at which time he had conversations with the defendants about the loan (R. 125, 142, 147). It was these conversations, not the telephone conversation of April 14, which Morey gave "some consideration to" in making the loan (R. 137).

that petitioner had told her that "Mr. Morey called him, and that he talked to him. I was called in at the end of, I think, the same conversation * * *" (R. 464). After she got on the telephone, and pursuant to Morey's request, Scott furnished Morey the names of dealers handling Estey Electronic Organs (R. 464).

B. The Trial Court's Charge

The court charged the jury that "Federal Law makes it a crime for anyone who has formed a scheme or plan to defraud others, *to use the United States mails, or interstate wire communications in attempting to carry out the plan to defraud* * * *. The defendants here, Mr. Hancock and Mrs. Scott, are now charged with two separate crimes of this nature. That is, having used, made use of the United States mails in carrying out such a fraudulent scheme, and on another occasion, of telephone communication between Vermont and New York, in carrying out the same fraudulent scheme. In order for either of the defendants to be found guilty on either of the two counts remaining, Counts One or Three, the Government must prove beyond a reasonable doubt * * * *that he or she used, or caused to be used, the mails or telephone communication* in the manner stated in that count for the purpose of carrying out the scheme to defraud. The mailing alleged in the first count was that of a letter from Brattleboro to Robert Morey, on or about April 14, 1955, and you will recall that the claimed letter is in evidence as 'Government's Exhibit 6'. The communication with Robert Morey, an officer of Guaranty Trust Company, alleged in the third count, was that of a telephone communication from Brattleboro, Vermont, to New York on or about April 14, 1955" (R. 645-647).[3]

On the question of reasonable doubt, the court charged: "The rule of reasonable doubt applies to each element of

[3] Emphasis supplied.

the offenses charged. That is, there was a use of the mails. So, as far as Count One is concerned, the forwarding of the paper and the use of inter-state wire communication in communicating with the bank in Count Three; that a scheme to defraud existed, that these papers contained false and fraudulent material, known to the defendants, to be false and fraudulent, that the defendants forwarded the papers but with intent to have the Guaranty Trust Company rely upon them, by so doing, the defendant intended to defraud the Guaranty Trust Company. So far as the wire communication was concerned, *that the information given by wire from Vermont to New York was information material to the carrying out of the scheme to defraud. If you have a reasonable doubt as to any one of these elements, it is your duty to acquit these defendants*" (R. 656-657).[4]

The court also charged: "So far as the third count is concerned, as I have said, the same elements are necessary to conviction on that count, that it must be established, beyond a reasonable doubt, that the defendants were parties to a scheme to defraud the Guaranty Trust by giving a false financial picture of the Estey Organ Company in the respects set forth in the indictment, that they intended to defraud the bank, and *that they talked on the inter-state wire to New York with Morey, and used the wire in order to give some information which was material to the scheme of obtaining the loan and defrauding the bank*" (R. 660-661).[5]

Petitioner excepted to the court's charge covering Count Three, "on the use of the telephone, in that the Court has failed to charge as we construe the statute, to require that they must find that such a telephone conversation originated in the State of Vermont, was instigated and transmitted

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[4] Emphasis supplied.

[5] Emphasis supplied.

out of Vermont by one or both of the defendants as part of a scheme. And, we except generally to the entire Charge wherever the matters referred to the use of the telephone and the wire communication, on our basic ground as set forth in our motion for directed verdict at the close of the evidence" (R. 665-666).[6]

C. Proceedings in the Court Below

Following his conviction, petitioner appealed to the Court of Appeals for the Second Circuit alleging: (1) that the telephone conversation of April 14, 1955 was not a transmission by means of wire communication for the purpose of executing a scheme to defraud within the meaning of 18 U. S. C. § 1343; (2) the evidence was insufficient to sustain the verdict; and (3) since the indictment alleged joint action pursuant to a joint scheme to defraud, the jury could not properly convict petitioner while failing to convict his co-defendant.

In affirming the judgment of conviction the Court of Appeals stated that there "was evidence from which the jury could find that in the interstate telephone conversation between Mr. Morey of the Guaranty Trust Company and Mr. Hancock on April 14, 1955 that Mr. Hancock made false representations as to shipments since April 1, that they were made for the purpose inducing the loan, and that the Trust Company relied upon them in making it" (Appendix "A", *infra*, at p. 14). Also, the Court of Appeals rejected petitioner's contention that because he did not initiate the telephone call, which Mr. Morey put through, he did not violate the statute. The court said:

> "Neither the words of the statute, nor any adjudicated case called to our attention, supports [petitioner's view]. Every telephone conversation is antiphonal. The recipient of a call 'transmits * * * sounds' over the wire, when he replies, and in the case at bar Mr. Morey did it 'for the purpose of executing such scheme or artifice.'" (Appendix "A", *infra*, at p. 15.)

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[6] See R. 321-322; 637-639.

Reasons for Granting the Writ

Petitioner was convicted for violating the Act of July 16, 1952, 66 Stat. 722, 18 U. S. C. § 1343, on the basis of fraudulent representations made by him during the course of an interstate telephone conversation originated by a bank official in New York City and on which the Bank did not rely in making the loan. Whether or not these fraudulent representations constitute a transmission by means of wire communication in interstate commerce for the purpose of executing a scheme to defraud is a substantial federal question which has not been, but should be resolved by this Court.

An enacted, section 1343 of Title 18, United States Code, was designed to check "fraudulent activities on the part of unscrupulous persons which are not within the reach of existing mail fraud laws, but which are carried out in complete reliance upon the use of wire and radio facilities and without resort to the mails." *H. Rep. No. 388 on H. R. 2948*, 82 Cong., 1st Sess., 2 (1951). The primary purpose of H. R. 2948 was to reach cases of "fraudulent advertising on the radio not involving direct sales by mail."[7] See, *Rose* v. *United States* (10 Cir.), 227 F. 2d 448, 449. During hearings on the bill the General Counsel of the Federal Communications Commission testified:

> "The Commission believes that enactment of this criminal statute, specifically directed at the use of the radio facilities, should result in increased vigilance on the part of station licensees to insure against acceptance of advertising which a reasonable amount of checking discloses to be patently fraudulent * * *. In this discussion I have directed my attention necessarily to incidents of radio fraud rather than to the use of telephone or telegraph facilities for these purposes. This is because most of the cases which have already come to the Commission have involved fraudulent use of radio rather than wire facilities. * * * However, it is also entirely possible to conduct

[7] H. Rep. No. 388 on H. R. 2948, *supra*, at p. 4.

> fraudulent sales campaigns by means of the interstate telephone or telegraph facilities, and we believe that it is entirely appropriate for Congress, at the time it takes action to prohibit radio frauds, also to extend the law to include use of wire facilities in order to close another possible avenue for the perpetration of such frauds." *Hearings, House Committee on the Judiciary on H. R. 2948*, 82nd Cong., 1st Sess., April 9, 1951, pp. 7, 11-12.

In *Roberts* v. *United States* (6 Cir.), 226 F. 2d 464, cert. den. 350 U. S. 935, the statute was attacked as unconstitutionally vague. The court said that "the statute does not violate the constitutional principle relied upon. The word 'sounds' must be considered together with their transmission by means of interstate wire, radio or television communication. So considered, the word is restricted in scope, and there is no necessity for a man of common intelligence * * * to have any doubt about it including the voice or speech of a human being." *Id.*, at p. 466.

In the case at bar, the question is whether petitioner's fraudulent representations in the course of an interstate telephone conversation initiated by a bank official in New York City constituted the "transmi[ssion] * * * by means of wire * * * communication sounds for the purpose of executing [the fraudulent] scheme * * *." Here, as in *Roberts* v. *United States*, the "word 'sounds' must be considered together with their transmission by means of interstate wire, radio or television communication." And so considered, we think it apparent that a fraudulent representation made in the course of a telephone conversation not initiated or placed by the defendant was not a transmission by means of wire communication for the purpose of executing the fraudulent scheme. We agree with the Court below that every telephone conversation is "antiphonal."[8] But we disagree that the "recipient of a call

[8] See, *United States* v. *Polakoff* (2 Cir.) 112 F. 2d 888; *Reitmeister* v. *Reitmeister* (2 Cir.), 162 F. 2d 691, but cf. *Rathbun* v. *United States*, 355 U. S. 107.

'transmits * * * sounds' over the wire, when he replies * * *" for the purpose of executing the fraudulent scheme.

In *Kann* v. *United States*, 323 U. S. 88, this Court held that the "federal mail fraud statute does not propose to reach all frauds, but only those limited instances in which the use of the mails is a part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state law." *Id.*, at p. 95. And one of the essential elements of mail fraud is the deliberate use of the mails as an instrument of communication as part or in furtherance of the execution of the fraudulent scheme. Cf. *United States* v. *Buckner* (2 Cir.), 108 F. 2d 921, 925, cert. den., 309 U. S. 669; *United States* v. *Cohen* (2 Cir.), 145 F. 2d 82, 89-91. Similarly, in the case of fraud by means of interstate wire communication, an essential element of the crime is the deliberate use of the telephone as part or in furtherance of the execution of the fraudulent scheme. Here, petitioner did not initiate or choose the *means* of communication. And, if criminality turns on whether the telephone call was interstate or made over an interstate wire, he had no control over the locale of the bank official at the time the call was placed.

The statutory term "transmits * * * sounds for the purpose of executing [the fraudulent] scheme" must be interpreted in the light of the expressed congressional purpose to reach fraudulent selling schemes by telephone "bucket shops." It must also be construed strictly. *E.g.*, *United States* v. *Resnick*, 299 U. S. 207, 209-210. Ordinarily, the term "transmits" by means of wire communication should be given the same or a similar meaning as the term "transmits by radio or television communication." And in common understanding, the individual who "transmits or causes to be transmitted" by means of radio or television communication is either the advertiser or broadcaster—it is not the owner of a radio or television set.

The interpretation placed upon section 1343 of Title 18, United States Code by the court below threatens to produce far-reaching and unintended consequences. If the recipient of a telephone communication may be subject to prosecution under the statute for false or exaggerated claims concerning his financial status, full, frank and untrammeled telephone communication between segments of the business world may now become guarded, devious and non-communicative. As a result, the businessman who receives a telephone call may feel that the initiator of the conversation, a vindicative or disappointed business opponent or competitor, an over-zealous prosecutor, or a combination of any of these could convert the ordinary business conversation into a criminal one. Similarly, the generally acknowledged "puffing" of the salesman may readily become his last free breath.

The question whether a fraudulent representation made during the course of an interstate telephone conversation not originated or initiated by the defendant constitutes a transmission by means of wire communication for the purpose of executing a scheme to defraud within the meaning of section 1343 of Title 18, United States Code, is a substantial federal question which has not been, but should be, resolved by this Court.

CONCLUSION

By reason of the foregoing the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 351—October Term, 1958.

(Argued June 9, 1959 Decided June 23, 1959.)

Docket No. 25547

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—v.—

HENRY HANCOCK,
Defendant-Appellant.

Before:

SWAN, HINCKS and MOORE,
Circuit Judges.

Appeal from the United States District Court for the District of Vermont, Hon. J. Joseph Smith presiding.[1] Affirmed.

EMANUEL SOBEL, *Attorney for Appellant.* David Farber on the Brief.

LOUIS G. WHITCOMB, U. S. Attorney and THOMAS WM. LYNCH, Assistant U. S. Attorney, *for Appellee.*

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[1] A Chief Judge of the District Court for Connecticut sitting by designation.

PER CURIAM:

Appellant was convicted of violating 18 U. S. C. A. § 1343 and was sentenced to imprisonment for a period of six months. The indictment contained three counts. The first two charged appellant and another with use of the mails to defraud, 18 U. S. C. A. § 1341. On the first count the jury failed to agree. On the second the judge directed acquittal of both defendants. On the third, under § 1343 Hancock was found guilty, and the jury disagreed as to his co-defendant.

Section 1343 of Title 18 provides that "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio or television communication, in interstate or foreign commerce, any writings, signs, signals, pictures or sounds for the purpose of executing such scheme or artifice, * * *" commits a crime.

The essence of the alleged scheme to defraud was to induce the Guaranty Trust Company to make a loan to Estey Organ Corporation by giving to the lender a balance sheet containing false figures as to "cash on hand and in the banks" and as to accounts receivable of the borrowing corporation. The bank balances were made to appear larger than in fact they were by failing to subtract outstanding checks. The receivables were falsified by preparing invoices purporting to show shipments which were not actually made. There was evidence from which the jury could find that in the interstate telephone conversation between Mr. Morey of the Guaranty Trust Company and Mr. Hancock on April 14, 1955 that Mr. Hancock made false representations as to shipments since April 1, that they were made for the purpose of inducing the loan, and that the Trust Company relied upon them in making it.

Appellant contends that because he did not initiate the telephone call, which Mr. Morey put through, he did not violate the statute. The contention is untenable. Neither the words of the statute nor any adjudicated case called to our attention supports it. Even telephone conversation is antiphonal.[2] The recipient of a call "transmits * * * sounds" over the wire, when he replies, and in the case at bar Mr. Hancock did it "for the purpose of executing such scheme or artifice."

The other contentions of appellant do not merit discussion.

Judgment affirmed.

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[2] See *United States* v. *Polakoff*, 2 Cir., 112 F. 2d 888, 889.

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 309

HENRY HANCOCK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was convicted by a jury in the District Court for the District of Vermont of furthering a scheme to defraud a New York bank through the use of an interstate telephone communication in violation of 18 U.S.C. 1343 (II R. 705-706). He was sentenced to serve a term of imprisonment of six months (I R. 696). On June 23, 1959, the court of appeals affirmed petitioner's conviction (Pet. 13-15; IV R. 4). No motion for rehearing was filed in the court of appeals. Since petitioner filed his petition and record in this Court on August 14, 1959, the 52d day after the judgment of the court of

appeals,[1] his petition is out of time under Rule 22(2) of the Rules of this Court. See the denials of certiorari in *Buie* v. *United States*, 317 U.S. 689, and *Keys* v. *United States*, 316 U.S. 694. See also *United States ex rel. Coy* v. *United States*, 316 U.S. 342, 344-346.

The instant case offers no occasion to waive the requirements of Rule 22(2) since there is clearly no merit in petitioner's only contention. He claims that he did not commit fraud by wire because he did not initiate the telephone conversation in which the fraudulent statements were made. But, as the court of appeals held, the recipient of a call, just as much as the sender, "transmits . . . by means of * * * wire . . . sounds" within the terms of 18 U.S.C. 1343. Since the sounds uttered by petitioner were for the purpose of executing a fraudulent scheme, he violated the explicit terms of the statute.

Respectfully submitted,

J. LEE RANKIN
Solicitor General.

SEPTEMBER, 1959.

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[1] Petitioner attempts to date the thirty-day period from July 20, 1959, the date when the court of appeals ordered a stay of the issuance of its mandate and ordered a continuation of petitioner's bail. Rule 22(2) of the Rules of this Court, however, provides for the running of the thirty-day period from the entry of "judgment" in the court of appeals. The order of July 20, 1959, was not a "judgment."

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